IT IS ORDERED as set forth below:

Date: June 26, 2008

James E. Massey
James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 07-73085
Phuc Thi Nguyen,	CHAPTER 7
Debtor.	JUDGE MASSEY
Wells Fargo Financial National Bank,	
Plaintiff,	
v.	ADVERSARY NO. 07-6656
Phuc Thi Nguyen,	
Defendant.	

ORDER DENYING MOTION FOR RECONSIDERATION

Defendant moves for reconsideration of an order denying what was in effect a motion for sanctions against Plaintiff. In its complaint, seeking a determination that a debt owed to it by Defendant was not dischargeable, Plaintiff alleged: "Debtor's actions show that the Debtor had

no intention to repay this Debt and that Debtor willfully and maliciously injured Creditor. 11 U.S.C. § 523(a)(6)." Defendant moved to dismiss the case, which the Court denied, and thereafter Defendant moved for summary judgment, which the Court granted after Plaintiff failed to respond to the motion. Defendant then filed a motion for sanctions against Plaintiff in the form of an "application for attorney fees." The application itself failed to give any reason that Plaintiff should be sanctioned. In the attached brief, Defendant discussed *Love v. Tower Loan of Mississippi, Inc. (In re Love)*, 577 F.2d 344 (5th Cir. 1978) and argued that Plaintiff's conduct in this case was "exactly" the conduct of the creditor in the *Love* case. Defendant's position appeared to be that the complaint had no factual merit, prompting the Court to deny the application for attorney fees because Defendant failed to comply with the safe harbor provision in Bankruptcy Rule 9011(c)(1)(A).

This case and the *Love* case are not "exactly" alike, substantially alike or even somewhat similar, either legally or factually. The only common fact is that neither plaintiff proved the claim made in the respective complaint.

In *Love*, the Fifth Circuit reversed the District Court, which had reversed the Bankruptcy Court's award of attorney's fees to debtor's counsel based on conduct of the plaintiff. The Court of Appeals held that the District Court abused its discretion in ruling that the Bankruptcy Court's award of sanctions was clearly erroneous. The Bankruptcy Court found that the creditor had not only failed to show that there was any factual basis for asserting its claim was not dischargeable, it also had acted in bad faith, vexatiously and for the purpose of harassment in pressing its alleged claim. The Court of Appeals determined that the Bankruptcy Court had inherent authority to impose sanctions under those circumstances.

> The Bankruptcy Court's findings of fact were based on numerous hearings in the case.
>
> Evidence adduced at the last hearing held herein and, especially, the admission under oath of the attorney for Tower Loan that the bankrupts had made an offer to reaffirm the obligation in full more than a year ago and that said offer was rejected, lead the Court to believe that the motivations of Tower Loan were something other than that of recovering the money that was loaned before this bankruptcy was filed. Therefore, the Court finds that the actions of Tower Loan have been totally in bad faith for the purpose of harassment of the bankrupts, all in clear violation of the letter and spirit of the Bankruptcy Act.

Matter of Love, 577 F.2d 344, 350 (5th Cir. 1978).

> Even the Court of Appeals itself became fed up with the creditor's tactics:
>
> During the proceedings before this Court, the Court announced that it had developed an attitude of prejudice toward Tower Loan. At the time of this announcement, the Court felt that Tower's relentless pursuit of this litigation resembled an effort to seek a pound of flesh rather than have the debt paid . . . .

Id. at 350-351.

In short, the creditor in Love was sanctioned for repeatedly acting in a vexatious and oppressive manner and harassing the debtor, even after the debtor agreed to reaffirm the debt!

In the present adversary proceeding, Plaintiff's complaint stated a claim for relief with respect to a debt for a willful and malicious injury under section 523(a)(6) in the form of conversion of Plaintiff's collateral securing a loan to Defendant. There is no dispute that Plaintiff had a security interest in an item of jewelry to secure a claim against Defendant. (More about the jewelry and what happened to it later.) Whether Plaintiff was also alleging fraud pursuant to section 523(a)(2) of the Bankruptcy Code was less clear. Unlike the plaintiff in the *Love* case, Plaintiff here filed only three documents: the complaint, a motion to extend the time to file a response to a motion to allege fraud with particularity and a response to that motion. Defendant consented to the order on the extension motion, and the Court denied the motion to allege fraud

with particularity because the Court concluded on further review that the complaint did not state a fraud claim. Unlike *Love*, there were no hearings held in this adversary proceeding. Unlike the focus of the plaintiff in *Love*, Plaintiff here was focused solely on collecting a legitimate debt secured by unaccounted for collateral.

Here, Defendant moved for summary judgment, which the Court granted; Plaintiff did not respond to that motion. In his affidavit supporting the motion, Defendant asserted that he left the jewelry, a necklace, in a brown bag in the trunk of his car along with some trash, that his brother threw out the contents of the trunk of the car and that Defendant searched the dumpster and did not find the jewelry. It is possible that the brother stole the necklace, that Defendant converted the necklace, that Defendant did not find the necklace in the dumpster because someone else found it first or that the necklace is in the garbage dump where the dumpster was unloaded. The alleged loss of the jewelry occurred after the petition date. These are unusual and somewhat suspicious facts. It was legitimate for Plaintiff to have been skeptical about such a story.

Defendant has not alleged, much less produced evidence to show, that Plaintiff engaged in a pattern of vexatious and harassing conduct. The failure to respond to the motion for summary judgment is not an admission that the complaint had no legitimate factual foundation. Plaintiff could have been motivated by a desire to cut its losses by not incurring further legal and other expenses that might far exceed any possible recovery.

Love is also distinguishable from the present case because the law in effect in 1978 has changed. Bankruptcy Rule 911, the predecessor to Bankruptcy Rule 9011, did not contain a safe harbor provision or any elaborate procedure for dealing with pleadings lacking any evidentiary support. That rule stated simply, "For a wilful violation of this rule, an attorney may be

subjected to appropriate disciplinary action." Rule 911 did not provide for the sanctioning of a party for filing a document lacking factual support.

Rule 9011, by contrast, contains an elaborate procedural methodology for dealing with pleadings that lack any factual or legal foundation. To ignore Bankruptcy Rule 9011(c)(1)(A) in the factual setting here would defeat its purpose, which is to avoid having to deal with motions for sanctions by requiring notice to the offending party and giving that party a chance to correct errors before the offended party can run up a lot of attorney's fees. Defendant failed to comply with Bankruptcy Rule 9011(c)(1)(A), and that failure was a proper ground on which to deny the application for fees.

In the motion for reconsideration, Defendant cites *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291 (11th Cir. 2006) for the proposition that the Court has inherent power to impose sanctions for bad faith conduct, as if that holding entitled Defendant to an award of sanctions against Plaintiff. This case is in apposite for two reasons.

First, the facts in *Sunshine* are nothing like the facts here. In that case, the creditor had repeatedly disobeyed orders of the Bankruptcy Court. That was why it was sanctioned. It was not a case in which the creditor asserted a claim against the debtor that it failed to prove and for that reason was sanctioned. Facts matter.

Second, the law on when a court should resort to relying on its inherent powers to impose sanctions is much more nuanced that Defendant and his counsel seem to understand. In the motion for reconsideration, Defendant states:

> In In re Sunshine Jr. Stores, Inc., 456 F.3d 1291, (11th Cir. 2006), the Court explained where the Bankruptcy Court had sanctioned under its inherent power:

> Chambers v. NASCO, Inc., 501 U.S. 32….(1991)… observed that it had the inherent power to sanction litigants for bad faith conduct.

Id. at 1302.

Motion for Reconsideration, p. 3. Based on this citation, Defendant jumps to the conclusion that this Court erred in denying the application for attorney fees because it has inherent power to sanction certain types of conduct.

Contrary to the plain meaning of the above quotation from Defendant's motion, what the Court of Appeals in fact stated was that the Bankruptcy Court relied on *Chambers v. NASCO, Inc*. as authority for its power to impose sanctions. There is no question about a federal court's inherent power to sanction bad faith conduct and disobedience of court orders. The more focused question is when should it do so. In *Chambers*, the Supreme Court answered that question as follows with respect to bad faith conduct:

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, *see Roadway Express, supra*, at 767, 100 S.Ct., at 2464. *Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.*

Chambers v. NASCO, Inc., 501 U.S. 32, 49-50, 111 S.Ct. 2123, 2135-2136 (1991). (Emphasis added.)

As the emphasized text above indicates, there are two considerations to be addressed before imposing sanctions. The first consideration is whether there is any need to resort to the bedrock of inherent authority. Here, there is no such need. Rule 9011 is up to the task of dealing with litigants who file complaints lacking evidentiary support, which is the essence of Defendant's contention that Plaintiff behaved improperly. A litigant who fails to comply with the rule waives a claim for sanctions for damages that compliance with the rule might have prevented.

The second consideration is the nature of the alleged misconduct. The record here shows that the complaint was entirely legitimate, even if Plaintiff had ultimately been unsuccessful in proving conversion. A creditor seeking to recover its collateral from a debtor does not act in bad faith because it does not believe the debtor when the debtor says, "my brother threw the jewelry in the dumpster and I looked in the dumpster and could not find it." This is essentially what Defendant is contending – he stated his position on how the jewelry was lost and because Plaintiff does not believe him, it is acting in bad faith. If there were a trial, and the court disbelieved a defendant who testified as Defendant did in his affidavit, the court could infer conversion because the defendant was the last person who had possession of the collateral. In other words, Plaintiff could make a prima facie case for conversion on Defendant's own admissions, thereby shifting to Defendant to prove that he did not convert the jewelry but simply lost it. Filing of a complaint alleging conversion under these circumstances of this case and forcing the Defendant to explain under oath what allegedly happened to the collateral did not constitute bad faith conduct.

In the *Chambers* case, the Supreme Court explained what it meant by "bad-faith" conduct in a footnote:

> In this regard, the bad-faith exception resembles the third prong of Rule 11's certification requirement, which mandates that a signer of a paper filed with the court warrant that the paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Id. at , 46 n.10, 111 S.Ct. 2123, 2133 (1991). Defendant has not alleged any facts to show that the conduct of Plaintiff amounted to bad faith in the sense of having some improper purpose in filing the complaint. The lack of allegations of fact showing bad faith conduct was fatal to the application and is fatal to the motion for reconsideration, particularly where Defendant could have used the provisions of Rule 9011 to make a charge that Plaintiff should have knew or should have known that it had no basis for its claim.

For these reasons, Defendant's motion for reconsideration of the Order denying the application for attorney's fees is DENIED.

END OF ORDER